

ANDREW D. CASTRICONE (SBN 154607)  
acastricone@grsm.com

DANIEL. D. O'SHEA (SBN 238534)  
doshea@grsm.com

MIGUEL A. SALDAÑA (SBN 299960)  
masaldana@grsm.com

GORDON REES SCULLY MANSUKHANI, LLP  
275 Battery Street, Suite 2000  
San Francisco, CA 94111  
Telephone: (415) 986-5900  
Facsimile: (415) 986-8054

Attorneys for Movants JOHNSON AKINBODUNSE;  
NASSER BASTANMEHR; PETER DEEME; TOM DIESSO;  
NATHAN DWIRI; ESTATE OF LOUIS MOSS; ESTATE OF  
JAMES STEELE; ESTATE OF RICHARD WIENER; MARCELO  
FONSECA; JAMES GILLESPIE; MAURICE HAROLD;  
DENNIS KORKOS; TIM LAPP; ALI MALIK; PAMELA  
MARTINEZ; LAKEW MELESE, HAL MELLEGARD; SHELDON  
MILLER; JOHN NAKIS; GERARD NOLOT; NICK OLSON;  
EUGENE PAN; STEVE REIMERS; ZUHAR SINADA; LAWRENCE  
SONG; ARTHUR TSE; and GENE WISHNOFF

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION

In re: Yellow Cab Cooperative, Inc.	)	CASE NO. 16-30063 DM
	)	Chapter 11
Debtor.	)	
	)	<b>MOTION FOR ORDER AUTHORIZING</b>
	)	<b>INSURANCE PAYMENTS FOR DEFENSE,</b>
	)	<b>OR IN THE ALTERNATIVE, MOTION FOR</b>
	)	<b>RELIEF FROM THE AUTOMATIC STAY;</b>
	)	<b>MEMORANDUM OF POINTS AND</b>
	)	<b>AUTHORITIES</b>
	)	
	)	Date: July 19, 2018
	)	Time: 9:30 a.m.
	)	Place: 450 Golden Gate Avenue
	)	San Francisco, CA 94102
	)	Courtroom: 17 (16 <sup>th</sup> Floor)
	)	
	)	Judge: Hon. Dennis Montali

Movants Johnson Akinbodunse; Nasser Bastanmehr; Peter Deeme; Tom Diesso; Nathan  
Dwiri; Louis Moss; James Steele; Estate Of Richard Wiener; Marcelo Fonseca; James Gillespie;  
Maurice Harold; Dennis Korkos; Tim Lapp; Ali Malik; Pamela Martinez; Lakew Melese, Hal  
Mellegard; Sheldon Miller; John Nakis; Gerard Nolot; Nick Olson; Eugene Pan; Steve Reimers;  
Zuhar Sinada; Lawrence Song; Arthur Tse; and Gene Wishnoff (collectively, "Movants" or

1 “Defendants”) hereby move for an order authorizing payment for the defense of individual  
2 insureds named in the state court action, San Francisco County Superior Court Case No. CGC-  
3 18-563681 (“State Court Action”) filed by Chapter 11 Trustee Randy Sugarman (“Trustee” or  
4 “Plaintiff”). This Motion requests that Defendants be allowed to receive payment for their  
5 defense under a director and officer liability policy, or in the alternative, for relief from the  
6 automatic stay for use of policy proceeds for their defense. This Motion also seeks a waiver of  
7 the 14-day stay under Rule 4001(a)(3) of the Federal Rules of Bankruptcy Procedure.

8 This Motion is made on the grounds that causes exists to life the automatic stay because  
9 former directors and officers of the Debtor Yellow Cab Cooperative, Inc. named in the State  
10 Court Action will be prejudiced if they are left without a defense.

11 This Motion is based upon Section 362(d)(1) of the Bankruptcy Code, the points and  
12 authorities, the Declaration of Miguel A. Saldana, all pleadings and records on file in this case,  
13 and such oral and/or documentary evidence as may be presented at or prior to the hearing on this  
14 Motion.

15 DATED: July 5, 2018

GORDON REES SCULLY MANSUKHANI, LLP

16 By: /s/ Miguel A. Saldana  
17 Miguel A. Saldana

18 Attorneys for Movants JOHNSON AKINBODUNSE;  
19 NASSER BASTANMEHR; PETER DEEME; TOM  
20 DIESSO; NATHAN DWIRI; LOUIS MOSS; JAMES  
21 STEELE; ESTATE OF RICHARD WIENER; MARCELO  
22 FONSECA; JAMES GILLESPIE; MAURICE HAROLD;  
23 DENNIS KORKOS; TIM LAPP; ALI MALIK; PAMELA  
24 MARTINEZ; LAKEW MELESE, HAL MELLEGARD;  
25 SHELDON MILLER; JOHN NAKIS; GERARD NOLOT;  
26 NICK OLSON; EUGENE PAN; STEVE REIMERS;  
27 ZUHAR SINADA; LAWRENCE SONG; ARTHUR TSE;  
28 and GENE WISHNOFF

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Johnson Akinbodunse; Nasser Bastanmehr; Peter Deeme; Tom Diesso; Nathan Dwiri; Louis Moss; James Steele; Estate Of Richard Wiener; Marcelo Fonseca; James Gillespie; Maurice Harold; Dennis Korkos; Tim Lapp; Ali Malik; Pamela Martinez; Lakew Melese, Hal Mellegard; Sheldon Miller; John Nakis; Gerard Nolot; Nick Olson; Eugene Pan; Steve Reimers; Zuhar Sinada; Lawrence Song; Arthur Tse; and Gene Wishnoff (collectively, “Movants” or “Defendants”) move this Court for an order authorizing it to pay Defense Expenses on behalf of former directors and an officer of the Debtor Yellow Cab Cooperative, Inc. (“YCC” or “Debtor”), named as defendants in the state court action titled *Randy Sugarman, Chapter 11 Trustee for Yellow Cab Cooperative, Inc. v. Hal Mellegard, Nathan Dwiri, et al.* with San Francisco County Superior Court Case No. CGC-18-563681 (“State Court Action”).

**II. BACKGROUND**

On January 22, 2016, Debtor filed its voluntary petition for relief under chapter 11 of the Bankruptcy Code, thereby commencing a chapter 11 bankruptcy. On November 15, 2016, the Bankruptcy Court ordered the appointment of Randy Sugarman as Chapter 11 Trustee (“Trustee” or “Plaintiff”).

On January 16, 2018, the Chapter 11 Trustee Randy Sugarman (“Trustee” or “Plaintiff”) filed the State Court Action against the directors and officers of YCC on claims of Breach of Fiduciary Duty, Avoidance of Voidable Transfers, Recovery of Avoided Transfers, Corporate Waste, Unjust Enrichment, Violation of California Corporations Code Section 12200 et seq., and Negligence. A true and correct copy of the Complaint is attached to the Declaration of Miguel A. Saldana (“Saldana Declaration”) as **Exhibit 1**. As of the date of this Motion, Defendants have answered the Trustee’s complaint and the parties are engaging in discovery.

Travelers Casualty and Surety Company of America (“Travelers”) retained Gordon Rees Scully Mansukhani, LLP (“GRSM”) as litigation counsel to represent Defendants in the State Court Action based on a Director and Officers Liability insurance policy (“D&O Policy”) issued by Travelers to Yellow Cab Cooperative, Inc. A true and correct copy of the D&O Policy is

1 attached to the Saldana Declaration as **Exhibit 2**.

2 The D&O Policy has an aggregate limit of \$1,000,000, with a supplemental personal  
3 indemnification limit of liability of \$500,000. Under the terms of the D&O Policy, an “Insured  
4 Person” means any natural person who was, is or becomes a duly elected or appointed member  
5 of the board of directors or officer. Movants qualify as Insured Persons as all of them were at  
6 one point prior to the State Court Action directors and/or officers of Debtor.

7 In an abundance of caution, Movants seek an order from this Court authorizing the  
8 payment of Defense Expenses under the D&O Policy in connection with the defense in the State  
9 Court Action. Alternatively, Movants seek relief from the automatic stay to allow payments of  
10 such Defense Expenses.

11 **III. ARGUMENT**

12 **A. Cause Exists for Granting Relief From the Automatic Stay**

13 Once a bankruptcy petition is filed, an automatic stay is imposed on most actions against  
14 the debtor. Bankruptcy Code § 362(a) provides, in pertinent part, that a petition “operates as a  
15 stay, applicable to all entities, of...any act to obtain possession of property of the estate or of  
16 property from the estate or to exercise control over property of the estate.” 11 U.S.C. § 362(a).  
17 Although courts have differed in concluding whether a directors and officer insurance policy  
18 constitutes property of the estate, the Ninth Circuit has held that such policies could be treated as  
19 property of the bankruptcy estate under Section 541. *See In re Minoco Grp. of Cos.*, 799 F.2d  
20 517, 519 (9th Cir. 1986).

21 Movants suggest that the D&O Policy does not constitute property of the estate, but even  
22 assuming that it does constitute property of the estate, Section 362(d)(1) of the Bankruptcy Code  
23 states that the automatic stay may be lifted for cause. 11 U.S.C. § 362(d)(1). Specifically,  
24 Section 362(d)(1) states:

25 On request of a party in interest and after notice and a hearing, the court shall  
26 grant relief from the stay provided under subsection (a) of this section, such as by  
terminating, annulling, modifying, or conditioning such stay—

27 (1) for cause, including the lack of adequate protection of an interest in  
28 property of such party in interest; ....

1 “Cause” for lifting the automatic stay “is determined on a case-by-case basis. *In re*  
2 *Tucson*, 912 F.2d 1162, 1166 (9th Cir. 1990); *In re Conejo Enterprises, Inc.*, 96 F.3d 346, 352  
3 (9th Cir. 1996). Bankruptcy courts have found “cause” to lift the automatic stay in order to  
4 allow a payment under a directors and officers liability insurance policy, even where the policy  
5 provides coverage to the debtor. See *In re Mila, Inc.*, 423 B.R. 537, 543-544 (9th Cir. BAP  
6 2010); *In re Cybermedica, Inc.*, 280 B.R. 12, 18 (Bankr. D. Mass. 2002); *In re Hoku Corp.*, No.  
7 13-40838-JDP, 2014 Bankr. LEXIS 1167, at \*12 (Bankr. D. Idaho Mar. 25, 2014).

8 In *In re Mila*, where the debtor corporation holding a D&O policy that would be eroded  
9 by defense payments filed for bankruptcy, the corporate officers facing lawsuits related to their  
10 actions on the corporation's behalf were granted relief from the automatic stay to obtain advance  
11 defense costs payments from the insurer under the policy, even where the D&O policy proceeds  
12 are deemed estate property. In determining whether to grant relief from the stay, the court must  
13 balance the harm to the debtor if the stay is modified against the harm to the directors and  
14 officers if they are prevented from enforcing their rights to defense costs. *In re Mila*, 423 B.R. at  
15 543-544. The bankruptcy court found that the director had incurred legal fees and other  
16 expenses related to defending the lawsuit and that the likelihood that the director would exhaust  
17 the \$1 million policy appeared to be remote. The bankruptcy court granted relief from the  
18 automatic stay to allow the director to receive defense costs payments from the insurer. The  
19 Bankruptcy Appellate Panel affirmed.

20 Similarly, in *In re Cybermedica*, the court granted two directors relief from stay to obtain  
21 payments from the insurer for defense costs incurred in defending against the trustee's action.  
22 280 B.R. at 17. The bankruptcy court concluded that cause existed to lift the stay, reasoning:

23 The directors and officers] may suffer substantial and irreparable harm if  
24 prevented from exercising their rights to defense payments. [The directors and  
25 officers] are in need now of their contractual right to payment of defense costs  
26 and may be harmed if disbursements are not presently made to fund their defense  
27 of the Trustee's Complaint. Additionally, the harm to the Debtor if relief from stay  
28 is granted is speculative given the fact that there are presently no claims for  
indemnification nor entity coverage....

1 *Id.* at 18; *see also Allied Digital Techs. Corp.*, 306 B.R. 505, 514 (Bankr. D. Del. 2004)  
2 (insurance proceeds held not property of estate, but even if they were, automatic stay was lifted  
3 when directors or officers face immediate harm and there was no evidence that coverage for the  
4 debtor will be necessary).

5 In this case, causes exists for an order authorizing payment of the Defense Expenses on  
6 behalf of Movants in order to defend themselves in the State Court Action. Without such  
7 payments, the Debtor's former directors and officers face the prejudice of potential inability to  
8 defend themselves against these claims. Thus, to the extent that relief from the automatic stay is  
9 required, Movants request an order lifting the automatic stay to allow payment of such Defense  
10 Expenses.

11 **B. The Order Should Take Immediate Effect**

12 Federal Rule of Bankruptcy Procedure 4001(a)(3) states, in pertinent part, that an order  
13 "granting a motion for relief from an automatic stay made in accordance with Rule 4001(a)(1) is  
14 stayed until the expiration of 14 days after the entry of the order, unless the court orders  
15 otherwise." Fed. R. Bankr. P. 4001(a)(3). In the State Court Action, the Trustee and Defendants  
16 are currently moving forward with extensive discovery efforts. As a result, Movants respectfully  
17 request that the Court order that the stay under Rule 4001(a)(3) not apply to the order granting  
18 this Motion.

19 **IV. CONCLUSION**

20 For the reasons stated above, Movants (i.e. Defendants in the State Court Action and  
21 former directors and officers) respectfully request that this Court enter an order authorizing

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

Travelers to pay Defense Expenses incurred or to be incurred by Defendants, with no stay on the effect of the order pursuant to Federal Rule of Bankruptcy Procedure 4001(a)(3).

DATED: July 5, 2018

GORDON REES SCULLY MANSUKHANI, LLP

By: /s/ Miguel A. Saldana  
Miguel A. Saldana

Attorneys for JOHNSON AKINBODUNSE; NASSER BASTANMEHR; PETER DEEME; TOM DIESSO; NATHAN DWIRI; LOUIS MOSS; JAMES STEELE; ESTATE OF RICHARD WIENER; MARCELO FONSECA; JAMES GILLESPIE; MAURICE HAROLD; DENNIS KORKOS; TIM LAPP; ALI MALIK; PAMELA MARTINEZ; LAKEW MELESE, HAL MELLEGARD; SHELDON MILLER; JOHN NAKIS; GERARD NOLOT; NICK OLSON; EUGENE PAN; STEVE REIMERS; ZUHAR SINADA; LAWRENCE SONG; ARTHUR TSE; and GENE WISHNOFF